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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS EUGENE ABBOTT,)	
)	No. 40249
Petitioner-Appellant,)	
)	Twin Falls Co. Case No.
vs.)	CV-2012-2138
)	
STATE OF IDAHO,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS

HONORABLE G. RICHARD BEVAN
District Judge

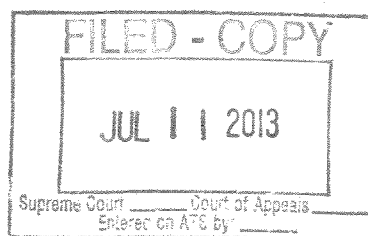
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STATEMENT OF THE CASE

Nature Of The Case

Dennis E. Abbott appeals from the district court's summary dismissal of his untimely successive petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

The factual background and procedural history of this case, as set forth by the district court, are as follows:

In an underlying criminal case, *State of Idaho v. Dennis E. Abbott*, Dist. Ct., Fifth Jud. Dist., Twin Falls County, Idaho, Case No. CR 1988-6300, Abbott pled guilty on April 30, 1986, to one count of Lewd Conduct with a Minor Under Sixteen[,] four counts of Sexual Abuse of a Minor, three counts of Lewd Conduct with a Minor, and two counts of Attempted Lewd Conduct with a Minor. Abbott was sentenced to life imprisonment and jurisdiction was retained in that case. After the retained jurisdiction, Abbott was placed on probation. Upon probation violation, the original sentence was imposed.

On June 17, 1991, Abbott filed a post-conviction relief claim. That claim was denied on March 19, 1992. In May 1995, Abbott filed a writ of habeas corpus which was dismissed on the ground of improper venue. On October 2, 1996, Abbott filed another post-conviction relief claim asserting that the time limitations were tolled due to his mental illness. While it appears that this post-conviction claim did not address Abbott's prior post-conviction relief claim, it nonetheless agreed that the time limitations were tolled due to Abbott's mental condition, but still found the petition untimely due to delay—of more than one year—from the time the mental condition cleared till [sic] the time the post-conviction claim was filed. That decision was upheld by the Court of Appeals on July 26, 2001, in an unpublished opinion (No. 755).

Abbot[t] also filed several Rule 35 motions, the first of which appears to have been filed in 1995 and the two most recent filed in February 2006 and October 2009. The denials of both those motions were appealed and affirmed by the Idaho Court of Appeals in unpublished

opinions (2007 No. 378 and 2010 No. 646). The Remittitur of the 2010 opinion was filed on October 20, 2010. On May 21, 2012, Abbot[t] filed a successive post-conviction relief claim. It appears that the underlying criminal conviction was never appealed.

(R., pp.39-40 (footnote omitted).)

On May 21, 2012, Abbott filed a successive petition for post-conviction relief, alleging ineffective assistance of counsel and that his guilty plea in his criminal case was not voluntary. (R., pp.9-19.) On June 8, the district court gave notice of its intent to dismiss Abbott's successive petition on the ground that it was filed outside of the statute of limitations. (R., pp.38-47.) More than 20 days later, on July 3, the district court summarily dismissed Abbott's untimely successive petition for post-conviction relief. (R., pp.49-50.) Abbott filed an amended petition on July 5 (R., pp.52-60), and the district court filed an amended dismissal (R., pp.61-63). Abbott filed a motion for reconsideration (R., pp.65-69), which the district court also denied (R., pp.81-83). Abbott filed a timely notice of appeal. (R., pp.85-89.)

ISSUE

Abbott states the issue on appeal as:

ACTUAL INNOCENCE (manifest injustice)

This is a miscarriage [sic] of justice insomuch as appeallant [sic] has suffered neary [sic] 30 years incarceration on an alledged [sic] crime he never committed [sic]. The [sic] fact of the matter is that there never was any evidence collected before the trial; that there were no witnesses, no medical testing at all, and nobody to testify against him. Absolutly [sic] no due process was used for this illgotten [sic] prosecution.

(Appellant's brief, p.5.)

The state rephrases the issue as:

Has Abbott failed to show error in the district court's dismissal of his untimely successive petition for post-conviction relief?

ARGUMENT

Abbott Has Failed To Show Error In The District Court's Dismissal Of His Untimely Successive Petition For Post-Conviction Relief

A. Introduction

Abbott was originally convicted in 1986, by guilty plea, of lewd conduct with a minor. Abbott v. State, 129 Idaho 381, 383, 924 P.2d 1225, 1227 (Ct. App. 1996) (hereinafter Abbott I). In 1991, Abbott filed his first petition for post-conviction relief, which was denied. (R., p.39.) In 1995, Abbott filed his first successive petition for post-conviction relief, which was dismissed. Abbott I, 129 Idaho at 383, 924 P.2d at 1227. In 1996, Abbott filed a second successive petition for post-conviction relief, asserting that his mental illness should toll the statute of limitations. (R., p.39.) The district court found that Abbott's mental illness tolled the statute of limitations, but that the petition was untimely due to delay and dismissed it. (R., pp.39-40.) On May 21, 2012, Abbott filed his third successive petition for post-conviction relief. (R., pp.9-19.) The district court dismissed the petition on the basis that it was untimely. (R., pp.38-47, 61-63.)

On appeal, Abbott asserts that the district court erred by summarily dismissing his successive petition for post-conviction relief, arguing that the time limits should not apply or should be equitably tolled. (Appellant's brief, p.6.) Application of the correct legal standards to the facts alleged by Abbott shows no error in the district court's dismissal of his untimely successive post-conviction petition.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists

based on the pleadings, depositions and admissions together with any affidavits on file” Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. Abbott’s Petition For Post-Conviction Relief Is Untimely And He Has Failed To Show A Sufficient Basis For Equitably Tolling The Statute Of Limitations

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* To be timely, a post-conviction proceeding must be commenced by filing a petition “any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of proceedings following an appeal, whichever is later.” I.C. § 19-4902(a). Under Idaho Code § 19-4906, a district court may summarily dismiss a petition for post-conviction relief when it “is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief,” by indicating its intention to dismiss and giving the parties an opportunity to respond within 20 days. I.C. § 19-4906(b); see also Workman, 144 Idaho at 523, 164 P.3d at 803.

Adhering to the requirements set forth in Idaho Code § 19-4906(b), the district court summarily dismissed Abbott’s successive post-conviction petition on the ground that it was untimely. (R., pp.38-47, 61-63.) In his underlying criminal case, Abbott was convicted of lewd conduct in 1986. (R., p.39.) Abbott never appealed. (R., p.40.) More than two decades later, on May 21, 2012, Abbott filed his current successive petition for post-conviction relief. (R., p.9.) Abbott’s successive petition for post-conviction relief was therefore clearly untimely under Idaho Code § 19-4902.

In the case of successive petitions the Idaho Supreme Court has “recognized that rigid application of I.C. § 19-4902 would preclude courts from considering ‘claims which simply are not known to the defendant within the time limit, yet raise important due process issues.’” Rhoades v. State, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009) (quoting Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007)). Idaho appellate courts, therefore, have allowed for equitable tolling in circumstances where the petitioner is incarcerated in an out-of-state facility without access to representation or Idaho legal materials, where his mental illness or medications render him incompetent and prevent him from pursuing a timely challenge to his conviction, or where the petitioner’s claim is based on newly discovered evidence. Judd v. State, 148 Idaho 22, 25-26, 218 P.3d 1, 4-5 (Ct. App. 2009). Absent a showing by the petitioner that the limitations period should be tolled, however, any petition filed outside the one-year limitation period of Idaho Code § 19-4902 is time-barred and subject to summary dismissal. Evensiosky v. State, 136 Idaho 189, 190-91, 30 P.3d 967, 968-69 (2001); Schultz v. State, 151 Idaho 383, 385, 256 P.3d 791, 793 (Ct. App. 2011).

Abbott argues that, because of his mental illness, the statute of limitations should be tolled. (Appellant’s brief, p.6.) This claim is barred by the doctrine of *res judicata*.

The doctrine of *res judicata* prevents re-litigation of issues that have been previously decided in a final judgment or decision in an action between the same litigants. State v. Rhoades, 134 Idaho 862, 863, 11 P.3d 481, 482 (2000). As the Idaho Supreme Court has explained:

Res judicata is comprised of claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). Under the principles of claim preclusion, a valid final judgment rendered on the merits by a court of competent

jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim.

Hindmarsh v. Mock, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Abbott, in his second successive petition for post conviction relief filed in October 1996, argued that the statute of limitations should be tolled due to his mental illness. (R., p.39.) The district court agreed that Abbott's mental illness tolled the statute of limitations until March 1995. Abbott v. State, Docket No. 26370, 2001 Unpublished Op. No. 755 at 3-4 (July 26, 2001) (hereinafter Abbott II). However, it held that his petition was still untimely due to delay, because Abbott did not file the petition until more than a year had elapsed from the time his mental condition cleared. (R., pp.39-40.) The Court of Appeals affirmed the district court. Abbott II at 4-5. If Abbott's second successive petition, filed 18 months after the tolling period ended, was untimely, then Abbott's current successive petition, filed more than 17 years after the tolling period ended, is also untimely. Because this is essentially "a subsequent action between the same parties upon the same claim," it is barred.

On appeal, Abbott also asserts that, because his challenge to his guilty plea was premised on a claim of actual innocence (without any new evidence or factual support for that claim), the statute of limitations should not apply to his successive petition. (Appellant's brief, p.6.) "[T]he bar for equitable tolling for post-conviction actions is high." Chico-Rodriguez v. State, 141 Idaho 579, 582, 114 P.3d 137, 140 (Ct. App. 2005). "Equitable tolling for post-conviction actions 'is borne of the petitioner's due process right to have a meaningful opportunity to present his or her claims.'" Schultz, 151 Idaho at 385-86, 256 P.3d at 793-94 (quoting Leer v. State, 148 Idaho 112, 115, 218 P.3d 1173, 1176 (Ct. App. 2009)). Courts "have not permitted equitable tolling

where the post-conviction petitioner's own lack of diligence caused or contributed to the untimeliness of the petition. Rather, in cases where equitable tolling was allowed, the petitioner was alleged to have been unable to timely file a petition due to extraordinary circumstances beyond his effective control, or the facts underlying the claim were hidden from the petitioner by unlawful state action." Amboh v. State, 149 Idaho 650, 653, 239 P.3d 448, 451 (Ct. App. 2010) (citations omitted).

Abbott essentially argues that equitable tolling should be extended to his claim of actual innocence merely because it is a claim of actual innocence. (Appellant's brief, p.6.) But the underlying reason for allowing equitable tolling, that the petitioner was prevented from timely filing his petition for post-conviction relief and thereby deprived of his opportunity to be heard, does not apply to Abbott's claim of actual innocence. Abbott was not prevented from timely filing his petition; he simply was not diligent in timely bringing his petition.

The Idaho Supreme Court's opinion in Rhoades v. State, 148 Idaho 247, 220 P.3d 1066 (2009), is instructive. Addressing Rhoades' argument that equitable tolling should apply to his claim of ineffective assistance of counsel, the Court held:

We have repeatedly held that ineffective assistance of counsel claims can or should be known after trial. In addressing one of Rhoades' previous appeals, we squarely addressed this issue. "Ineffective assistance of counsel is one of those claims that should be reasonably known immediately upon the completion of the trial and can be raised in a post-conviction petition." The facts of the case, being particularly within the knowledge of the defendant should be sufficient to alert a defendant to the presence of ineffective assistance of counsel. In this case, Rhoades had access to the material related to his case, including the PGM testing results. Rhoades has further alleged that he is innocent. Assuming his claim of innocence to be true, even if Rhoades did not know that the PGM testing exculpated him, he would have been on notice that it may have

done so. Accordingly, we conclude that the district court properly dismissed this claim as untimely.

Id. at 253, 220 P.3d at 1072 (citation omitted). Likewise, actual innocence “is one of those claims which should be reasonably known immediately upon the completion” of the underlying proceedings and “is particularly within the knowledge of the defendant.” Abbott’s lack of diligence in timely filing a claim of which he should have been immediately aware does not provide a basis for equitable tolling.

Furthermore, Abbott failed to present a *prima facie* claim of actual innocence. To establish a claim of actual innocence, the standard enunciated by the United States Supreme Court in Schlup v. Delo, 513 U.S. 298 (1995), requires the petitioner to “show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” Id. at 327. Abbott not only failed to produce new evidence undermining his guilty plea, he produced no evidence at all.

The Idaho Supreme Court’s opinion in Rhoades is on point. In that case, the Court did not decide whether due process required a free-standing actual innocence exception to the statute of limitations because “the facts alleged by Rhoades [did] not establish a *prima facie* case of actual innocence.” Id. at 252-53, 220 P.3d at 1071-72. Just like the petitioner in Rhoades, Abbott cannot “show that it is more likely than not that no reasonable juror would have convicted him.” Therefore, even if a claim of actual innocence could provide a basis for equitable tolling, Abbott failed to allege a *prima facie* case of actual innocence.

Equitable tolling should not be extended to situations where the petitioner is not prevented from timely filing his petition, regardless of the claim the petitioner is raising. Abbott’s successive post-conviction petition was untimely and the district court correctly

dismissed it on this ground. The district court's order summarily dismissing Abbott's untimely successive petition should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's summary dismissal of Abbott's untimely successive petition for post-conviction relief.

DATED this 11th day of July, 2013.



RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of July, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by placing a copy in the United States mail, postage prepaid, addressed to:

DENNIS E. ABBOTT
IDOC #21214
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